

Jus Post Bellum: The Importance of War Crimes Trials

DAVIDA E. KELLOGG

© 2002 Davida E. Kellogg

“Three periods must be distinguished with respect to every war: its inception; its prosecution, before victory is gained; and the period after victory.”

— Francisco Suarez

On 13 November 2001, President George W. Bush, in his capacity as Commander-in-Chief, issued an order that would allow suspected foreign terrorists to be tried by US military tribunals.¹ At the time, Secretary of Defense Donald Rumsfeld stated that he had not yet had a chance to fully research the legal and practical ramifications of implementing such proceedings. But resort to military tribunal, which has a long history of customary use in the United States dating back to the American Revolution (see *Madson v. Kinsella*, 1952), has been considered by the Supreme Court (*Ex Parte Quirin*, 1942; *Application of Yamashita*, 1946), and ruled to be an appropriate venue for the trial of non-citizen belligerents accused of offenses against the law of war. It is the considered opinion of many military legal experts that the Supreme Court would affirm the constitutionality of such use of military commissions in the context of the current war on terrorism, together with the rules for them promulgated by Secretary Rumsfeld, if and when this question ever comes before it.² Nevertheless, the issue of military commissions is already on trial in the court of public opinion, where it is widely assumed that the projected effects of this order on American security and civil liberties will be largely negative.³

Even before the events of 11 September 2001 provided the impetus for the President's order, the apprehension of Slobodan Milosevic had already brought our role in international war crimes tribunals into question.⁴ Arguments

Report Documentation Page		
Report Date 00Nov2002	Report Type N/A	Dates Covered (from... to) -
Title and Subtitle Just Post Bellum: The Importance of War Crimes Trials		Contract Number
		Grant Number
		Program Element Number
Author(s) Davida E. Kellogg		Project Number
		Task Number
		Work Unit Number
Performing Organization Name(s) and Address(es) US Army War College ATTN: Parameters 122 Forbes Avenue Carlisle, PA 17013-5238		Performing Organization Report Number
Sponsoring/Monitoring Agency Name(s) and Address(es)		Sponsor/Monitor's Acronym(s)
		Sponsor/Monitor's Report Number(s)
Distribution/Availability Statement Approved for public release, distribution unlimited		
Supplementary Notes		
Abstract see report		
Subject Terms		
Report Classification unclassified		Classification of this page unclassified
Classification of Abstract unclassified		Limitation of Abstract SAR
Number of Pages 13		

against our participation in such proceedings have been advanced to the effect that it is disingenuous to imagine that the rule of law applies to warfare; that war crimes tribunals serve only to enforce “victor’s justice” on those whose only real crime was having had the bad moral luck to be raised in a society that approved of genocide and other crimes against humanity, or to have served in a military that engaged in war crimes; that war crimes “show trials” cannot undo past wrongs, nor can laying blame further peace and reconciliation; that international jurisdiction over war criminals threatens national sovereignty; and that trumped-up charges and unfair trials in “kangaroo courts” might be used as a means for disgruntled weaker nations to take out their resentments on the soldiers of more powerful ones.

In essence, these objections break down into arguments that war crimes trials are either philosophically or procedurally flawed, or impracticable. Some of these objections, like those based on cultural relativism, the supposed impossibility of imposing the rule of law on warfare, or “bad moral luck” are specious. Others, like concerns for sovereignty and the fairness of both accusations and judgments handed down by war crimes tribunals, raise serious legal and practical concerns, but do not necessarily constitute sufficient reason for us to categorically absent ourselves from these proceedings. I argue, to the contrary, that the meting out of punishment for crimes against humanity and war crimes, whether in international tribunals or in our own civil courts, courts-martial, or military tribunals, is in fact the natural, logical, and morally indispensable end stage of Just War. If Just War is undertaken to right wrongs done by a group or groups of people to another—if in fact the only acceptable reason for going to war is, as Michael Walzer⁵ and other Just War theorists contend, to do justice—then stopping short of trying and punishing those most responsible for war crimes and crimes against humanity which either led to war or were committed in its prosecution may be likened to declaring “checkmate” and then declining to take your opponent’s king. It makes no strategic sense, since the purpose for which war was undertaken is never achieved. It makes no legal sense, since the criminal activities the war was undertaken to rectify or curtail are allowed to continue unchecked. What is worse, it makes no moral sense, since justice is not done for the victims of atrocities in such an outcome to war.

Declining to do full justice for those who have been most grievously wronged by aggression, whether from without or within their national borders, leads to the perpetration of further moral injustice on both the victims of war crimes and on innocents among the criminals’ countrymen, ethnic group, or

Dr. Davida Kellogg is Adjunct Professor of Military Science at the University of Maine at Orono. She holds three degrees in the natural sciences from Columbia University. A 1992 military history fellow at West Point, she has taught military history for Army ROTC, ethics for Army and Air Force ROTC, and has assisted in navigation and shipboard operations courses for Navy ROTC. She has been a regular contributor to the annual JSCOPE conference for the past seven years.

co-religionists. In the case of the victims of atrocities, sweeping these injustices under a thick dusty rug of history, whether to keep a fragile peace or in a foredoomed effort at reconciliation, only continues their abusive treatment as non-persons who do not even register on the radar screen of international justice. Given no legitimate forum where their justified moral outrage is vented on the criminals most responsible for their suffering, victims too often become victimizers, taking out their anger and frustration indiscriminately and disproportionately on anyone who looks, sounds, or smells like their abusers, without benefit of trial.⁶

If we do nothing to prevent such illegal and immoral outcomes to Just War, then the natural and foreseeable consequences that follow from warfare may negate its justness as much as if it had been unjustly declared or unjustly waged. The crux of my argument is that there is a third pillar to Just War, which I will call “jus post bellum” or justice in the wake of war, that should be considered along with jus ad bellum and jus in bello, so that the resulting tripod may support a more stable just peace.

Warfare, Law, and Doing Justice

Just War theory is customarily characterized as resting upon two mutually supportive pillars—jus ad bellum or justice in going to war, and jus in bello or justice in waging war. Both of these concepts have gone through a long and tortuous evolution from Biblical scripture, through Greek philosophy, Roman *Jus Gentium*, and Christian (via Roman Catholic) theology, to the secular law of armed conflict. Some of the jus in bello injunctions enumerated in Deuteronomy 20:10-20,⁷ for example, not to mention the jus ad bellum criteria of taking land and disseminating religion, would no longer be considered acceptable under the modern secular international law of war. But in the Biblical specification of conditions for, and in, warfare, within the body of religious law, is the germ of the application of secular national and international law to warfare. Central to this concept is the purpose of law with respect to warfare, which is to translate the moral abstraction of justice into some concrete reality secured by force.

The linkage between the moral ideal of justice and the practical agencies of warfare and national and international law was implicit in Plato’s discussion of jus ad bellum and jus in bello conditions in his *Republic*⁸ and *Laws*.⁹ That connection was made explicit in the term “Just War” (*Bellum Justum*) coined by Aristotle,¹⁰ and by the inclusion of jus ad bellum and jus in bello under the rubric of Just War. The just use of force requires both justification and limitations, and the specification and enforcement of both is the purview of law.

Together, justice in going to war and justice in waging war are traditionally presented as both necessary and sufficient to set conditions during two critical times when hostile nations must take scrupulous care to do justice. The first of these times is before formal hostilities have begun, when the decision to go to war is being made. Jus ad bellum criteria have varied throughout a long evolution. But already in first century B.C. Rome, Cicero had narrowed down acceptable *cassi*

belli, or causes for war, to defense of the honor or safety of what he called “the ideal state,” flatly stating that “those wars which are unjust are undertaken without provocation, for only a war waged for revenge [in the sense, as I read it, of retributive justice] or defense can be just.”¹¹ Fittingly, it was St. Ambrose, who was Roman governor of northern Italy before becoming Bishop of Milan, who explicitly related the secular legal considerations governing warfare under Roman *Jus Gentium* to the moral constraints placed on warfare by Christian theology, through the cardinal virtues, chief of which he considered to be justice.¹² This same thread of moral justification runs in the opposite direction from the Augustinian specification, grounded in Christian theology, that war be fought only with right intention to Hugo Grotius’s secular legal requirement that nations have a just cause for going to war. Wars have been, and still are, fought for “elbow room,” natural resources, political hegemony, ethnic or religious dominance, etc. But, in its strict modern construction, *just* war may be undertaken primarily, if not solely, as a means of redressing wrongs inflicted on innocents, or to force an aggressor to cease and desist from inflicting harm, especially when negotiation and other means short of war have failed.¹³ The difference between these and other causes or intentions such as those listed above is a matter of justice, informed by ethics.

The second time when justice ought to be done is throughout the conduct of war itself. It is these *jus in bello* considerations that govern rules of engagement by setting limits on the targets and means of justly waged war. Military realists have long argued that such rules do not apply under conditions of combat, predictably quoting Cicero’s most famous dictum, “*Silent enim leges inter arma*” (“In time of war, the law falls silent”)¹⁴ or misquoting William Tecumseh Sherman to the effect that “War is Hell” to support this cynical and dangerous proposition. To baldly assert that “war is cruelty and you cannot refine it” is dangerous, because it covers a cynical dismissal of action that could save countless lives and prevent untold suffering. And the reasoning leading to this cynical conclusion—that nothing need be done to mitigate the horrors of war because nothing can be done—is demonstrably false. It flies in the face of centuries of experimentation and success in both the development and application of Just War theory.

Moreover, such appeals to Cicero and Sherman are either taken out of context or stretch the intended sense of those authors’ statements. For one thing, it is difficult to reconcile the author of such statements as “there are certain duties that we owe even to those who have wronged us . . . [and] there is a limit to retribution and punishment”¹⁵ with a flippant dismissal of *jus in bello* restrictions. That “in war the laws are silent” seems, on closer inspection, to be Cicero’s legal advice to his fellow citizens that they accept certain provisions in the Roman constitution temporarily limiting their civil rights in time of war,¹⁶ much as we have been forced to accept certain limitations on our liberties for security’s sake since 9/11. What it does not seem to be is an argument for the suspension of the law of war. Sherman himself made just such an effort at the refinement of warfare as he claimed to be impossible when he issued the order for the evacuation of Atlanta before burning

the city. His justification of that order to General Hood, the Confederate commander there—"God will judge whether it be more humane to fight with a town full of women at our back or remove them in time to places of safety among their own friends and people"—reads very like an argument for discrimination of civilians from combatants, one of the twin pillars of *jus in bello*. Sherman also argued that because the South had started the Civil War, it had little right to complain about any hardships the Union visited on its people as a result. I will return to the vexed problem of collective guilt later in this article. But my point here is that even the author of perhaps the most (mis)quoted justification for modern military realism recognized the existence of moral principles that ought to apply in wartime.

A related notion—that because in every war there are some soldiers who do not abide by these principles, rule of law is therefore impossible in wartime, and all other soldiers are, on account of the criminality of the few, released from their professional *jus in bello* obligations—also fails to convince. This idea is based on the proposition that if a law is broken, it must be because it is impossible to obey. This, too, is demonstrably false, for in every war, on every side, there are many more soldiers who somehow manage to serve honorably than there are perpetrators of war crimes. Moreover, soldiers can and do accomplish their missions and win wars while fighting within the limitations of the law of land and aerial warfare; indeed, not doing so in this age of televised warfare may, in fact, prove counterproductive to the achievement of one's national war aims.¹⁷ From a legal standpoint, it is patently absurd to hold that laws should apply only so long as nobody breaks them.¹⁸ A body of law consisting only of rules no citizen would ever break would be superfluous at best. At worst, it would be vicious in the Aristotelian sense of being full of vice. For even if some irrational society were to exist in which no law its people broke remained in effect, such a state of *de facto* lawlessness would still be immoral because of the injuries and injustices it would allow to be perpetrated on innocents.

By any moral reasoning one can marshal, law—the purpose of which is to do justice, in part by punishing violators of others' national, international, and natural human rights—can and does have a great deal to say on the subject of war. Its voice can be muted by vicious acts of governments, and vicious or just plain morally lazy peoples can and do turn a deaf ear to its requirements. But because the consequences of making no effort to limit the depredations of warfare are so terrible, war is the one place where law must be allowed to speak the loudest.

Jus Post Bellum, the Third Leg of the Just War Tripod

Together with *jus ad bellum* considerations, the *jus in bello* principles of discrimination of civilians from combatants and proportionality of means are generally presented as an exhaustive listing of the components of Just War. There is, however, as Francisco Suarez observed, a third point in the waging of war when justice should be done, and that is when a justly declared and justly fought war is over (*jus post bellum*).¹⁹ Once hostilities have ceased, those most griev-

ously harmed have a natural right to some reasonable expectation that a just society (and, by extension, the civilized nations or the world, if they wish to be thought just) acknowledge the fact that atrocious crimes have been perpetrated on them, and fairly judge and exact punishment from the perpetrators. Societies that are wise, as well as just, will see to it that these expectations are met.

In another paper related to this article, I assessed the culpability for war crimes and consequent liability for punishment of all three kinds of bad actors distinguished by Aristotle in his *Nichomachean Ethics*—the morally weak; the preferentially immoral, or wicked; and the morally deficient brute.²⁰ It has become the fashion among indicted war criminals to claim membership in the third of these categories. As moral deficients, they then invoke their “bad moral luck” in having grown up in the poisonously anti-social atmosphere of a Nazi Germany (or Milosevic’s Serbia, or apartheid-era South Africa, or a Palestinian village on the west bank of the Jordan)—circumstances in which they had no choice—as an exculpatory excuse for their participation in atrocities. One can, however, recognize the corrupting influence of an evil society on character without necessarily accepting it as sufficient reason to excuse an individual’s evil actions.²¹

Paul Christopher writes that Hugo Grotius, father of the international law of war, “argues that to participate in a crime a person must not only have knowledge of it but also have the opportunity to prevent it.”²² “The problem,” as David Cooper points out, “is that if the ideology [of an evil society] were *that* powerful, nearly everyone would have gone along with its dictates.”²³ This proposition, like the one that warfare is unrefinable cruelty, is demonstrably untrue. Members of even the worst of the above-mentioned evil societies, Nazi Germany, contrived to do good in the face of socially condoned and sponsored evil, proving that it was indeed possible for ordinary German citizens to both know and do better than commit atrocities. In the final analysis, unless one had been raised in the woods by wolves, a claim to innocence of atrocities by virtue of socially acquired brutishness reduces to nothing more extenuating than the old “but everybody else was doing it” defense, cynically—and therefore knowingly—presented as moral philosophy. Even the willfully self-delusional brute knows the crimes he commits to be evil, but he convinces himself, or allows himself to be convinced, of the outrageous fiction that they are not, in order to facilitate the commission of his crimes; as such, he is not the ignorant brute he claims to be, but preferentially wicked, and so he is responsible for the harm he does.

If the morally weak, the preferentially wicked, the cynically self-styled brute, and even the self-delusional brute are responsible for the harm caused by their part in planning, directing, carrying out, advocating, or tolerating crimes against humanity, war crimes, and atrocities, then it follows by moral reasoning that they may be held criminally liable for punishment for the infliction of that harm. Ideally, all of them ought to be punished to the extent that they have taken part in the perpetration of crimes against humanity. In actuality, time and funds for the investigation and trial of war criminals are limited, but those most responsible among

***“To shrink from condemning and punishing
atrocities is, however tacitly, to condone evil.”***

them—the Hitlers, the Goerings, the Pol Pots, the Milosevics, the Karadzics, and other architects of genocide—at the very least, *must* be punished. The reasons have to do with the relationship of Just War and the law of war to the doing of justice.

To shrink from condemning and punishing atrocities is, however tacitly, to condone evil. To allow evil to be done is itself an evil. It is to add insult to injury by trivializing, sometimes to the point of utterly denying, the injury suffered by the victims of atrocities. It is to side with criminals against their victims, judging the wronged unworthy of justice while holding those who wronged them above it. On the most fundamental of moral principles, it is unjust. And for a society (or a community of nations) to work such an injustice in the name of its citizens is to wrong the righteous among them as well. The proper venue for doing this kind of justice in the wake of war is in properly constituted and conducted war crimes tribunals.

It has been argued that the cause of peace and reconciliation is not served by the laying of blame and the meting out of punishment in war crimes tribunals.²⁴ Considering the inhumane deeds and irreparable harm done by war criminals, it is the height of presumption to imagine that their victims should ever forgive them.²⁵ In any case, it is not the purpose of Just War to force reconciliation of the victims of war crimes with their abusers.²⁶ The establishment of lasting peace is better served by the doing of justice in the wake of war. The doing of that particular form of justice by recognizing and publicly placing blame on those most clearly responsible for atrocities and exacting fair retribution is the purpose of war crimes tribunals. That there be some formal avenue for doing this sort of justice, and that it be done in such a way that the victims accept as just, is absolutely necessary in order to prevent the wholesale assigning of collective guilt to, and the taking of indiscriminate and disproportional revenge on, the possibly innocent families, associates, and countrymen of war criminals by their victims, which can only guarantee further warfare and the perpetration of further war crimes.

The subject of collective guilt is one that most Just War theorists would prefer not to confront. I see it as a doomsday machine that could bring about the end of the Just War tradition, and, with it, all efforts to mitigate the worst cruelties of warfare. For collective guilt, in diametric opposition to Just War, is based on the presumption of universal guilt. The proponents of collective guilt do not burden their fighters with demands that they make vital moral decisions on the battlefield.

Some Vietnam War veterans I have spoken with, and also some cadets I have instructed in the law of war, have argued that the loosening of legal and moral

restrictions on the treatment of nominal civilians who act as soldiers but claim civilian immunity may offer the only practicable way of countering guerrilla warfare.²⁷ For their part, guerrillas claim (quite disingenuously, since guerrilla strategy is organically dependent upon the deliberate blurring of the line Just War tradition draws between combatants and civilians) that such dishonorable tactics represent their only means of standing up to more powerful nations. But to the extent that nominal civilians increasingly play some part in modern warfare, their specially protected status is increasingly eroded. In the absence of the protections civilian status provides noncombatants, all enemy civilians—young “men” well below any reasonable draft age, women, babies, medical personnel, clergy, the elderly, and incapacitated hospital patients—may be indiscriminately targeted; the wounded may be bayoneted on the battlefield rather than taken prisoner since there is no specially protected status for those rendered hors de combat; and POWs may be tortured and murdered since their captors will no longer be under any legal or moral obligation to treat them humanely. Indeed, indiscriminate revenge-taking of the universally guilty upon the universally guilty will not provide the stabilizing influence of *jus post bellum*, but a never-ending *casus belli*. And inch by inch, we shall all be dragged backwards into Hobbes’s nightmare “natural” state of “combat of all against all,” where life will indeed be “nasty, brutish, and short.”

Just War advocates are driven by a desperate desire to prevent such horror. But apologists for the 9/11 attacks and other acts of terrorism have no such compunctions about assigning collective guilt, and have enthusiastically embraced this immoral practice. Osama bin Laden, in a widely aired videotape, claimed legitimacy for his deliberate targeting of the World Trade Center, in which thousands of civilians worked, on the grounds that it supported American economic power. “The American people,” bin Laden declared, “should remember that they pay taxes. . . . They are,” therefore, on the grounds of the collective guilt he and other militant Islamic fanatics indiscriminately assign them, “responsible for American policy,” and so are deserving of the indiscriminate terror attacks he admitted ordering against them. In return, the hearts of many American citizens were hardened toward all people of Middle Eastern descent by bin Laden’s obvious pleasure in the death of innocents, by the destruction he caused, and by the sight of beaming Palestinians dancing in the streets at the news of attacks on America, whether they felt free to publicly admit it to microphone-wielding newsmen or not. Unfortunately, Arab-Americans do have reason to worry about the consequences to them of bin Laden’s atrocities. Their best hope for a peaceful future in this country resides in their increasingly mistrustful neighbors seeing justice done to bin Laden and his lieutenants for the innocent victims of the 9/11 attacks through a well-regulated legal process.

Law, Justice, and War Crimes Tribunals

The proper venue for working justice in the wake of war is the war crimes tribunal. That said, it must be admitted that as a means of doing justice,

courts of law are an imperfect instrument, as are all instruments for the realization of ideals. One of the most commonly raised objections to war crimes trials is that international tribunals convened, constituted, and conducted by the winning side necessarily render only “victor’s justice” (a term coined by Herman Goering to cast aspersions on his Nuremberg trial) on the vanquished, ignoring similar crimes perpetrated by victorious soldiers and government officials.²⁸ In fact, the Nuremberg trials, of which Goering complained, could not bring everyone who had been in some way responsible for war crimes to justice; regrettably, no war crimes tribunal ever can. And because some will be punished, while others who have done similar evil, or worse, will go free, the argument raised by Goering and others against them runs, then it is “unfair” to punish any.

The fatal weakness of Goering’s complaint against “victor’s justice” is that whether or not Allied soldiers who may have committed war crimes ever came to trial or were punished, his own crimes were no less atrocious or deserving of punishment for that; in logical terms, Goering and any other war criminals, Allied or Axis, were independently culpable on their own (de)merits. Since individual culpability for atrocities render all war criminals liable, there is no reason why the inability to punish every one of them should negate the justice of punishing individuals, so long as their punishments are commensurate with their proven responsibility for their alleged crimes. It is hardly an injustice to hold each man accountable for his own criminal activities, so long as due process is given in all cases without regard to nationality. It would, however, be unjust to the victims of atrocity to let the perpetrators of the crimes against them go free on such a cynically jury-rigged technicality as “victor’s justice.” What matters is that an indicted individual’s crimes be justly judged and punished, not that some statistical standard measure of “fairness”—so many trials and convictions for the victors vice so many for the vanquished—be arbitrarily set and slavishly adhered to.

More substantive objections have been raised to the effect that international jurisdiction over war crimes tribunals threatens national sovereignty. Nations exist, first and foremost, to secure the human rights of their citizens from foreign threats. This is why, as Yoram Dinstein puts it, “the prohibition of the use of force in international relations may be considered the cornerstone of modern international law.”²⁹ But this cornerstone affords little protection to ethnic and religious minorities when the threat to them comes from a politically powerful faction within their own borders claiming “ethnic cleansing” as its sovereign national right. If the doing of justice is the underlying purpose of law, then human rights must weigh heavily against considerations of national sovereignty in such cases. And, in fact, an exception is made (pursuant to Chapter VII of the UN Charter) to allow for military intervention in the internal affairs of a sovereign nation when such action is ordained or authorized by the UN Security Council.

Dinstein stresses that however morally justified such intervention may be, it is legal only when ordained or authorized by the Security Council. But James Terry concludes from his reading of W. Gary Sharp’s new book on *jus paciarii* that

“We may come to regret missing the opportunity to influence the first permanent tribunal for war crimes now that it is a fait accompli.”

“existing law and state practice permit a state or collective of states in a regional organization like NATO to use armed force to prevent genocide and other widespread abuses of human life within its regional boundaries whether Security Council authorization is present or not.”³⁰ Some authors, like Anthony Ellis, believe that the way to deal with allegations of “victor’s justice” leveled against international tribunals would be to have each nation try and punish its own war criminals. These, however, would be vulnerable to similar charges of “unfairness” in cases where they fail to convict or hand down what the complainants would consider insufficiently severe sentences.³¹ In any case, the fact that military intervention in a sovereign nation’s internal affairs may be legally permissible, or even mandated, under certain conditions strongly implies that so may intervention in the form of participation in international war crimes tribunals.

Of particular concern to American lawmakers contemplating our participation in international war crimes trials is the fear that US service members could be brought up on trumped-up charges leveled against them by jealous or disgruntled nations, and forced to face prosecution in “kangaroo courts.”³² Accordingly, on 7 December 2001, the US Senate approved, by an overwhelming vote of 78-2, an amendment to the 2002 Defense Appropriations Bill that would exempt American service members from prosecution by the International Criminal Court (ICC), which has since been formally established by the ratification of a 1998 treaty by 60 nations. So great is US concern over the possibility of wrongful prosecution of US troops that the American Service Members Protection Act, as this amendment is called, even authorizes the use of military force to free any US service members or government officials detained by that court.

Principal US allies that have ratified this treaty have expressed disappointment at America’s declining to ratify it. There is no reason why either international, or national, war crimes tribunals should necessarily hand down unjust verdicts. But, considering the suspect intentions and hostile attitudes of some of the nations (Syria, Sudan, Algeria, Nigeria, etc.) that have acceded to the treaty, wrongful prosecution of American troops on trumped-up charges by this court would be a distinct and very troubling possibility. Under such circumstances, our government’s reservations may be justified. However, we may come to regret missing the opportunity to influence the first permanent tribunal for war crimes now that it is a fait accompli. The one-year exemption of US service members

from prosecution by the ICC, voted 12 July by the UN Security Council in order to secure continuation of American peacekeeping operations in Bosnia, may be viewed as a sign that such influence may be exerted to our advantage.

Ironically, similar concerns have been raised about President Bush's order allowing for trial of suspected foreign terrorists by military tribunals for acts of war, especially when the accused are not soldiers in the service of an aggressor nation, making it impossible for us to make a formal declaration of war under current international law. Such courts have much to recommend them—they are mobile and may be conducted on the spot abroad where critical witnesses may be, and they are more efficient in the process of evidence-gathering and better able to ensure the security of any classified information presented than are open federal courts. Although there is no reason why US military tribunals should necessarily be any less fair than our federal courts, a perception of military tribunals as kangaroo courts has taken hold in the public view.³³ Under the circumstances, I must reluctantly agree with Phil Cave that, although the Supreme Court may uphold the legality of military tribunals in the context of the war on terrorism should the issue come before it, "the cases of accused terrorists may be [better] resolved politically by the countries involved. A trial in which the military controls who is tried and the rules of evidence 'is like adding fuel to the fire of a bad perception'";³⁴ the attendant loss of political "currency" may be too great.

Even before they are brought before any court, whether military or civilian, we are faced with the question, which has grown pressing in the past few months, of how to treat the terrorists we now have in custody at Guantanamo Bay. Those captured al Qaeda fighters were certainly not innocent civilians. But neither were they legitimate soldiers. President Bush's use of the term "unlawful combatants" comes fairly close to an accurate description, but what does that tell us about how we are to treat them? Under Ancient Roman law, those who fought in a campaign without having legally been sworn into service could be held liable for murder. Like them, the prisoners now in custody at Guantanamo Bay were sworn into the service of no recognized country; their allegiances appear to be personal and religious rather than national. One is inclined, following the ancient Roman precedent, to treat them as common murderers, but the US decision to grant them the protected status of prisoners of war, whether they are legally entitled to it or not, is best for the sake of public perception; it also provides the advantage of being able to hold them for the duration of our military operations in Afghanistan.

The international law of war has barely begun to deal with the question of where to try cases in which the aggressor is a diffuse political or religious entity rather than a nation. But there are precedents on which to draw, and the task is no more impossible than the development of the law of war to this point has been. Whatever is decided to be a properly convened, constituted, and conducted court for such cases, the high moral purpose of *jus post bellum*—to do justice in the wake of war—must be well and truly served by them, and must be seen to be so. Ellis asserts that "the only legitimate aims of punishment must be forward look-

ing,” i.e., to incapacitate wrongdoers and deter others from their crimes. I would say, rather, that in the case of war crimes and crimes against humanity, justice ought, Janus-like, to look both backward to punish evildoing and, where appropriate, order reparations, as well as looking forward to prevent further crimes of revenge. Rendering such justice must remain the exclusive prerogative of courts of law, and must on no account ever be permitted to be taken out into the streets.

NOTES

1. George W. Bush, “Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism,” 13 November 2001, internet, <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>, accessed 6 June 2002.

2. Jeffrey Addicott, “Military Tribunals are Constitutional,” internet, <http://jurist.law.pitt.edu/forum/forumnew51.php>, accessed 6 June 2002. See also Phil Cave, quoted in Deborah Funk, “Military Tribunal Order Raises Questions of Fairness,” *Army Times*, 10 December 2001, and numerous others.

3. Hendrik Hertzberg, “The Wrong Man,” *The New Yorker*, 10 December 2001, p. 45; Gwynne Dyer, “Bin Laden’s Best Bet to be Arrested by the Right People,” *Bangor Daily News*, 11 December 2001; David Murray, “The Lesson of Nuremberg,” *Boston Globe*, 12 December 2001; and others. Particularly disturbing is a cartoon by Rex Babin, originally printed in the *San Francisco Bee* and reprinted in *Army Times*, in which the President, Secretary of Defense, and Attorney General are depicted riding over the Constitution in a tank, blithely leaving tread marks behind them.

4. For the purposes of this paper, I shall follow the usage of Alan Gerwirth (“War Crimes and Human Rights,” in *War Crimes and Collective Wrongdoing: A Reader*, ed. Aleksander Jokic [Oxford, Eng.: Blackwell, 2001], p. 49), who, recognizing that crimes against peace, violations of jus in bello principles (or war crimes, in the narrow sense), and crimes against humanity (or atrocities) are “sufficiently commingled that the phrase ‘war crimes’ can be used in a broader sense to comprise all three.”

5. Walzer wrote: “Nothing but aggression can justify war. . . . ‘There is a single and only just cause for commencing a war,’ wrote Vitoria, ‘namely a wrong received. . . . Nothing else warrants the use of force in international society—above all not any difference in religion or politics.’” Michael Walzer, *Just and Unjust War* (2d ed.; New York: Basic Books, 1992), p. 62.

6. As ethnic Albanian Kosovars recently did on their erstwhile Serbian neighbors.

7. For example, to “smite every male [of a besieged city] with the edge of the sword,” taking the women and children alive, presumably for the purpose of slavery.

8. Plato, *The Republic*, Bk. V, 471 a5-b5, in *Collected Dialogues*, ed. Edith Hamilton and Huntington Cairns (Princeton, N.J.: Princeton Univ. Press, 1961).

9. Plato, *Laws*, Bk. XII, 955 b9-c6, in *Collected Dialogues*.

10. Aristotle, *Politics*, 1256 b25, p. 199, in *The Complete Works of Aristotle*, Vol. 2 (Princeton, N.J.: Princeton Univ. Press, 1985).

11. Marcus Tullius Cicero, *De Re Publica*, 3, XXIII, trans. Clinton Walker Keyes (New York: Putnam, 1928).

12. “For courage, which in war preserves one’s country from the barbarians, or at home defends the weak or comrades from robbers, is full of justice.” Ambrose, *Duties of the Clergy*, Bk. I, XXVII, 129, p. 22, ed. Philip Schaff (Grand Rapids, Mich.: Eerdmans, 1969).

13. There is some debate as to whether, if Just War may be undertaken only in response to wrongs done by an aggressor, those opposing the aggressors have a “natural moral right to victory.” The con side of this debate seems to be constructed largely on the self-servingly twisted Just War terminology certain aggressors employ as a smoke screen for their activities. The passionate insistence of overwrought Palestinian apologists that America’s pursuit of a Mideast foreign policy more sympathetic to Israel than they would like was an “act of aggression” deserving of the 11 September attacks, or Slobodan Milosevic’s defense at his UN war crimes trial that equates unintended collateral damage of American bombings with his government’s policy of internally directed aggression on ethnic minorities, are cases in point. The former example also raises the question of the legality of intervention by one nation or a coalition in the internally directed aggression of another. But when one has cut through the deliberately twisted rhetoric and legalistic arguments that appeal to the letter of the law in order to deny its spirit, something very like a moral right to victory emerges from the principle of just cause. It is the idea expressed by Abraham Lincoln when he said that God could not be on both sides in the US Civil War. There is a vast and unbridgeable moral difference between an Army ethically employed in the service of a just cause and terrorists. As Eric Cantor and Frank Lautenberg wrote in a recent editorial (“Truth About Terror,” *Bangor Daily News*, 11 December 2001), in a world where “millions of innocent lives are at risk from fanatics who see no difference between killing a child in a stroller and a soldier in a tank . . . a ‘good’ terrorist is indeed an obscene proposition. . . . George

Washington was a revolutionary, but he was no terrorist. Osama bin Laden is both." One man's terrorist ought not be excused for his atrocities on the grounds that he is another man's "freedom fighter."

14. Cicero, *Pro Milone*, IV, XI.

15. Cicero, *De Officiis*, Bk. I, XI, p. 35.

16. Conversations with Dr. Michael Howard, Professor of Philosophy, University of Maine.

17. As I have argued elsewhere. Davida Kellogg, "Guerrilla Warfare: When Taking Care of Your Troops Leads to War Crimes," Proceedings of the 19th Joint Services Conference on Professional Ethics (JSCOPE '97), Ft. McNair, Washington, D.C., 30 January 1997, internet, <http://www.usafa.af.mil/jscope/JSCOPE97/Kellogg97.htm>.

18. Anyone unconvinced of this need only try a little legal experiment: The next time you are summoned to traffic court, see how far you get convincing the judge that you were not required to obey the posted speed limit by virtue of the fact that the driver of the car ahead of you was speeding.

19. Francisco Suarez, "The Three Theological Virtues," Disputation XIII, in: *Selections From Three Works*, ed. G. L. Williams, A. Brown, and J. Waldon, *Classics of International Law*, Vol. 2, ed. James Brown Scott (Oxford, Eng.: Clarendon Press, 1944), p. 836.

20. Davida Kellogg, "Justice in the Wake of War and the Importance of War Crimes Trials in the Prosecution of Just War," 24th Joint Services Conference on Professional Ethics (JSCOPE '02), Springfield, Va., 24-25 January 2002, internet, <http://www.usafa.af.mil/jscope/JSCOPE02/Kellogg02.html>.

21. This is in fact the position taken by Daniel Goldhagen, author of the chilling *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (London: Abacus, 1996).

22. Hugo Grotius, *The Law of War and Peace*, Bk. II, ch. 21, II, 4, p. 524. Paraphrased in Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (2d ed.; Upper Saddle River, N.J.: Prentice Hall, 1999), p. 146.

23. David Cooper, "Collective Responsibility, Moral Luck, and Reconciliation," in Jokic, pp. 205-15.

24. Burleigh Wilkins, "Whose Trials? Whose Reconciliation?" in Jokic, pp. 85-96.

25. The aging Pol Pot's disingenuous proposal that the surviving victims and families of those who died in his killing fields should let bygones be bygones was as insulting as it was absurd. Prince Norodom Sihanouk's signing into law of his decision to allow the trial of Pol Pot's murderous Khmer Rouge in a UN-assisted genocide tribunal was, as an 11 August 2001 news article ("Cambodia's King Signs Law to Try Khmer Rouge," *Bangor Daily News*) stated, "a big step towards obtaining justice for victims." UN concerns about its proper constitution, however, prevented this tribunal from being convened. In the end, the UN broke off talks with the Cambodian government. But, though an international trial will now not be held, a Cambodian one remains a possibility.

26. Anthony Ellis, "What Should We Do With War Criminals?" in Jokic, pp. 97-112. Working from analogy with the treatment of rape in municipal criminal law, Ellis (p. 107) argues that reconciliation

... is a way of talking whose natural home lies in the idea that criminal offenses are *disputes*, that in "constructing" them as crimes, we falsify them, and that the proper aim of law should be a satisfactory resolution of the dispute. . . . [But] a rape is not, save trivially, a dispute, and it does not demand reconciliation. . . . What rape demands is prevention (and *retribution*, if one believes in that), and that is the only thing that it is realistic to expect the criminal law to do to any significant extent. The same is true of war crimes. A war may sometimes be simply a dispute, but a war crime is not; it is a wrong done by one party to another and calls for prevention.

27. Davida Kellogg, "On the Importance of Having an Honorable Enemy—Moral Asymmetry in Modern Warfare and the End of the Just War Tradition," Can Nations Handle National and International Crises Ethically?—The 4th Canadian Conference on Ethical Leadership, Royal Military College, Kingston, Ontario, 7-9 November 2001.

28. Richard Falk, "Accountability and the Legacy of Nuremberg," in Jokic, pp. 113-36.

29. Yoram Dinstein, "The Thirteenth Waldemar A. Solf Lecture in International Law," *Military Law Review*, Vol. 166, 2000, pp. 93-108.

30. James Terry, review of W. Gary Sharp, Sr., *Jus Paciarum: Emergent Legal Paradigms for Peace Operations in the 21st Century*, in *Military Law Review*, 1999, p. 392.

31. The Calley case is one in which I believe we have left ourselves open to such charges.

32. "Those would be great places to be tried in if you were in the American military and you had been fighting some tinhorn dictator who got ahold of you and decided to put you on trial." Senator Jon Kyl, quoted in Rick Maze, "Senate Aims to Keep Soldiers Out of War-Crimes Court," *Army Times*, 24 December 2001.

33. "There is an aura about secret military trials for foreigners that the United States would not applaud if they were used against US citizens." Military legal expert Kevin Barry, quoted in Deborah Funk, "Military-Tribunal Order Raises Questions of Fairness," *Army Times*, 10 December 2001. See also Rex Babin's cartoon from the *Sacramento Bee*, and numerous other political cartoons and editorials.